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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 STEPHEN KNIGHT LEWIS

12 Plaintiff,

13 v.

14 STATE OF WASHINGTON, *et al.*,

15 Defendants.
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Case No. C08-5523FDB/JRC

REPORT AND RECOMMENDATION
TO GRANT SUMMARY JUDGMENT
TO THE REMAINING DEFENDANT

NOTED FOR:
April 30, 2010

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18 This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the
19 undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636 (b) (1) (A) and 636 (b) (1) (B)
20 and Local Magistrate Judge' Rules MJR 1, MJR 3, and MJR 4.

21 Plaintiff's claims against other defendants were previously dismissed for failure to state a
22 claim. (Dkt. #44). The only remaining claim is against defendant Sidney Clark, a prison
23 counselor, for allegedly submitting "erroneous information" to the End of Sentence Review
24 Committee. This information included information about an alleged rape that occurred while
25 plaintiff was in the military. The End of Sentence Review Committee changed plaintiff's
26 designation from level I to level II (Dkt. # 34 amended complaint page 3). In the previous
REPORT AND RECOMMENDATION- 1

1 Report and Recommendation, the court noted that this was a substantive due process claim and
2 that the issue of substantive due process had not been briefed (Dkt. # 38, page 5). As previously
3 noted, procedural due process has not been violated in this case because the sex offender
4 classification and notification does not involve a liberty interest. See Russell v. Gregoire, 124
5 F.3d 1079 (9th Cir. 1997) (no liberty interest in classification or notification).

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7 Plaintiff is asking for four and one half million dollars (\$4,500,000) in damages and an
8 injunction relieving him of the duty to register as a sex offender (Dkt. # 34, page 6). Defendant
9 Clark moves for summary judgment and is asserting that the information regarding the alleged
10 rape did not come from him. Defendant also asserts that plaintiff has not sought relief from the
11 duty to register in state court (Dkt. # 56).

12 STANDARD OF REVIEW

13 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment “if the
14 pleadings, depositions, answers to interrogatories, and admissions on file, together with
15 affidavits, if any, show that there is no genuine issue of material fact and that the moving party is
16 entitled to judgment as a matter of law.” The moving party is entitled to judgment as a matter of
17 law when the nonmoving party fails to make a sufficient showing on an essential element of a
18 claim on which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S.
19 317, 323 (1985).

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21 There is no genuine issue of fact for trial where the record, taken as a whole, could not
22 lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith
23 Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant
24 probative evidence, not simply “some metaphysical doubt.”). See also Fed. R. Civ. P. 56 (e).
25 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting
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1 the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth.
2 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific
3 Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

4 The court must consider the substantive evidentiary burden that the nonmoving party
5 must meet at trial, which in most civil cases is proof by a preponderance of the evidence.
6 Anderson, 477 U.S. at 254; T.W. Elec. Service Inc., 809 F.2d at 630. The court must resolve any
7 factual dispute or controversy in favor of the nonmoving party only when the facts specifically
8 attested to by the party contradict facts specifically attested to by the moving party. Id.
9 Conclusory, nonspecific statements in affidavits are not sufficient, and “missing facts” will not
10 be “presumed.” Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

12 DISCUSSION

13 The plaintiff did not respond to the motion for summary judgment on the merits and
14 instead filed an untimely motion for an extension of time that has been denied. The uncontested
15 facts are that the information regarding the alleged rape that occurred while plaintiff was in the
16 military was provided to the End of Records Review Committee by Jennifer Williams, a
17 Correctional Records Supervisor who works for the Committee. Jennifer Williams is not a
18 defendant in this action. The information was obtained directly from the United States Military –
19 and not from Defendant Clark.

21 Ms. Williams states that the information was available to the Committee members, but,
22 because Mr. Lewis was not arrested or charged with rape as a result of this alleged incident, the
23 Committee did not score this incident (Dkt. # 56, Exhibit 2, affidavit of Jennifer Williams). The
24 court is not sure if this means the information was not considered, or that the alleged rape did not
25 count as a conviction for scoring purposes. In either event, Defendant Clark has demonstrated
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1 that he played no part in obtaining this information or providing it to the End of Sentence
2 Review Committee. This evidence is uncontradicted.

3 1. *Personal participation.*

4 To survive summary judgment plaintiff needed to come forward with admissible
5 evidence to show that Defendant Clark personally caused the harm alleged in the complaint.
6 Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). The inquiry into causation must be
7 individualized and focus on the duties and responsibilities of each individual defendant whose
8 acts and omissions are alleged to have caused a constitutional violation. Leer v. Murphy, 844
9 F.2d 628, 633 (9th Cir. 1988). A defendant cannot be held liable under 42 U.S.C. § 1983 solely
10 on the basis of supervisory responsibility or position. Monell v. New York City Dept. of Social
11 Services, 436 U.S. 658, 694 n.58 (1978). A theory of respondeat superior is not sufficient to
12 state a § 1983 claim. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982). Plaintiff has not come
13 forward with evidence to show how defendant Clark is responsible for the information reaching
14 the End of Sentence Review Committee. Defendant Clark has shown that it was another person
15 who obtained the information. In the absence of any contradictory evidence, Defendant Clark is
16 entitled to dismissal of the claim for damages.

17 2. *Injunctive relief.*

18 Plaintiff also requests an injunction relieving him of the duty to register as a sex offender.
19 The defendant states without further argument that plaintiff has not “petitioned the sentencing
20 court to be relieved of such duty” (Dkt. # 56, page 2). The inference is that there is a state
21 procedure in place that would allow plaintiff to obtain the injunctive relief and that he is not
22 seeking such relief from the sentencing court. It is plaintiff’s duty to show he is entitled to
23 injunctive relief.
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3 A party seeking injunctive relief must fulfill one of two standards, the "traditional" or the
4 "alternative." Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987).

5 Under the traditional standard, a court may issue preliminary relief if it
6 finds that (1) the moving party will suffer irreparable injury if the relief is denied;
7 (2) the moving party will probably prevail on the merits; (3) the balance of
8 potential harm favors the moving party; and (4) the public interest favors granting
9 relief. . . . Under the alternative standard, the moving party may meet its burden
10 by demonstrating either (1) a combination of probable success and the possibility
11 of irreparable injury or (2) that serious questions are raised and the balance of
12 hardships tips sharply in its favor.

13 Id. (citations omitted).

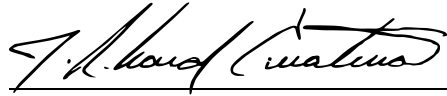
14 Plaintiff fulfills neither test because he does not show irreparable injury as a result of the
15 requirement to register. In Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997), the Ninth Circuit
16 held that mandating sex offenders register with local law enforcement was not punishment. The
17 Ninth Circuit Court refused to issue an injunction. Plaintiff does not contest that he has been
18 convicted of as a sex offender and is subject to registration. The defendant is entitled to
19 summary judgment on this issue.

20 CONCLUSION

21 Defendant Clark is entitled to summary judgment. He did not personally participate in
22 obtaining the information in question and the plaintiff has not shown an injunction is appropriate.
23 Pursuant to 28 U.S.C. § 636 (b) (1) and Rule 72 (b) of the Federal Rules of Civil Procedure, the
24 parties shall have fourteen (14) days from service of this Report to file written objections. See
25 also Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for
26 purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit

1 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on April 30, 2010,
2 as noted in the caption.

3 Dated this 25th day of March, 2010.

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6 J. Richard Creatura
7 United States Magistrate Judge
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